92-137

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THE RIDGECREST POLICE, a Municipal Law Enforcement Agency; THE CITY OF RIDGECREST, a Municipal Corporation; EDWARD JOHN LUARCA aka E.J. LUARCA; STEPHEN COMPTON; RANDY GENE BIAS; JEFFREY KRUGER,

Petitioners,

vs.

KENNETH CHRISTOPHER CURNOW, a minor, by and through his Guardian ad litem, SANDRA CURNOW; KEN CURNOW; SHEILA EFFLANDT; SANDRA CURNOW, as Administratrix of the Estate of STEVEN MURRAY CURNOW, Deceased; CHRIS CURNOW; and SANDRA CURNOW, as an individual,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioners

WAYNE LEMIEUX (CA Bar No. 043501)
Law Offices of Wayne Lemieux
200 N. Westlake Boulevard, Ste. 102
Westlake Village, California 91362
(805) 495-4770

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit erred by admitting into evidence as an affidavit under Rule 56(c) an unsigned statement taken in question and answer format, submitted in opposition to appellants' motion for summary judgment based upon qualified immunity, where:

a. No evidence exists indicating that the deposition officer was authorized to administer the oath;

b. No evidence exists indicating that the deposition officer accurately transcribed the statement of the witness, as the witness did not sign or otherwise verify the statement;

c. Opposing counsel had no notice of questioning or opportunity to cross-examine the witness and observe her demeanor; and

d. The decision is in conflict with the decisions of courts in most circuits to consider the issue.

2. Whether the Ninth Circuit erred in not granting summary judgment to three of the four named police officers on the basis of qualified immunity where:

a. The undisputed facts show that the three officers participated only in the initial entry into the home of decedent, which entry the district court explicitly held to be reasonable; and

b. The undisputed facts show that the two shots causing the death of decedent were not fired by any of the three officers.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding, as they appeared in the style of the case, are those in the caption.

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vs.

KENNETH CHRISTOPHER CURNOW, a minor, by and through his Guardian ad litem, SANDRA CURNOW; KEN CURNOW; SHEILA EFFLANDT; SANDRA CURNOW, as Administratrix of the Estate of STEVEN MURRAY CURNOW, Deceased; CHRIS CURNOW; and SANDRA CURNOW, as an individual,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Ninth Circuit entered in this action on December 26, 1991.

OPINIONS DELIVERED IN THE CASE

The Ninth Circuit delivered an opinion in this case for publication reported at 952 F.2d 321. (A-1.)

STATEMENT OF JURISDICTION

Petitioners' appeal the decision of the Ninth Circuit Court of Appeals to affirm the district court's denial of summary judgment based upon qualified immunity, filed on December 26, 1991. Petitioners filed a Petition for Rehearing on January 9, 1992. The Ninth Circuit denied petitioners' Petition for Rehearing on April 2, 1992. (D-1, D-2.)

The Ninth Circuit had jurisdiction over petitioners' appeal from a denial of a motion for summary judgment based upon qualified immunity pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). This court has jurisdiction to review the order of the Ninth Circuit by writ of certiorari pursuant to Title 28 of the United States Code section 1254(1).

STATUTORY PROVISIONS INVOLVED IN CASE

1. Federal Rule of Civil Procedure, Rule 56(c): Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving parties are entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

2. Federal Rules of Civil Procedure, Rule 56(e): Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

3. California Code of Civil Procedure Section 2093: Authority to Administer Oaths and Affirmations.

(a.) Every court, every judge or clerk of any court, every justice, and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has the power to administer oaths or affirmations.

(b.) Every shorthand reporter, certified pursuant to Article 3 (commencing with section 8020) of Chapter 13 of Division 3 of the Business and Professions Code, has the power to administer oaths or affirmations and may perform the duties of the deposition officer pursuant to section 2025. This certified shorthand reporter shall be entitled to receive fees for services rendered during a deposition, including fees for depositions services, as specified in subdivision (c) of section 8211 of the Government Code.

STATEMENT OF THE CASE

A. Statement of Procedure.

Respondents, the Estate of Steven Curnow, his parents and his children, filed this action in the United States District Court for the Eastern District of California against petitioners Ridgecrest Police, City of Ridgecrest,

and four (4) individual police officers. The claims which are the subject of this writ are brought pursuant to Title 42 of the United States Code sections 1981, 1983, and 1985. Subject matter jurisdiction of the federal court was invoked pursuant to Title 28 of the United States Code sections 1331 and 1343.

After respondents filed their third amended complaint, petitioners moved to dismiss the action on the basis of qualified immunity. On March 3, 1989, the district court granted petitioners' motion to dismiss as to Ridgecrest Police and City of Ridgecrest. (B-1, B-8.) As to the individual officers involved in the incident, however, the court denied the motion to dismiss. (B-7.)

Importantly, the district court separated the shooting incident into two distinct events: (1) the entry into the home of the decedent; and (2) the actual shooting of decedent. (B-6.) As to the first event, the district court held that the entry into decedent's home by the officers was objectively reasonable and did not violate clearly established law under the Fourth Amendment, relying on *Mincey v. Arizona*, 437 U.S. 385 (1978). (*Id.*) As to the second event, however, the district court held that the facts necessary for a proper determination of the propriety of the shooting were in dispute and qualified immunity was therefore not available. (B-6, B-7.) Petitioners filed an answer to respondents' Third Amended Complaint on or about March 29, 1989.

On or about January 10, 1990, petitioners moved for summary judgment on the basis of qualified immunity and submitted sworn, signed declarations by three of the four named police officers attesting to the nature of their

involvement in the shooting incident. (C-1.) Respondent submitted the "statement" of Mercedes Taylor, a witness to the incident, in opposition to the motion for summary judgment. (C-2.) The statement of Mercedes Taylor was taken in question and answer format on May 6, 1986, transcribed from shorthand into typewriting by Kristin Coil, "shorthand reporter," and unsigned. (C-2, C-3.)

The district court admitted Taylor's statement into evidence and denied petitioners' motion for summary judgment as to all four of the officers on the basis that genuine issues of material fact precluded issuance of summary judgment. (C-4.) The Ninth Circuit affirmed the ruling of the district court as to the admissibility of Taylor's statement. (A-9.) The Ninth Circuit did not, however, address whether or not Officers Bias, Compton and Kruger should have been dismissed from the case on the basis of qualified immunity.

B. Statement of Facts.

On April 5, 1986, at approximately 10:00 p.m., the decedent, Steven Curnow ("Curnow"), and Mercedes Taylor ("Taylor") were standing in the kitchen of Curnow's home when a window was shattered by an object from outside the home. Curnow and Taylor believed someone had shot at them and therefore called the Ridgecrest Police Department. (A-4.) As respondent admits, Curnow then retrieved an HK-91 semi-automatic rifle from his closet. (*Id.*)

Upon arrival at the scene, the police questioned the occupants of the house next to Curnow's before proceeding to the Curnow residence. After examining the broken window and determining that no shots were fired, the police were allowed to enter Curnow's home and continue their investigation. (*Id.*)

Officer Randy Bias ("Bias") observed the HK-91 in Curnow's bedroom. Curnow asked Bias if it is legal to have such a weapon. Bias informed Curnow that it was. (*Id.*)

During the investigation, Bias learned that Taylor had been threatened by her ex-husband. After the officers left the scene, Officer Edward Luarca ("Luarca") went to the home of Taylor's ex-husband to question him. Taylor's ex-husband denied any involvement with the breaking of the window. (*Id.*)

The next evening, Officer Bias informed his supervisor that he would conduct a routine follow-up by contacting Curnow's neighbors to determine if they saw anything or knew anything about the window breaking incident. (*Id.*) At approximately 10:30 p.m., April 6, 1986, Bias interviewed the neighbors regarding any noise they might have heard or any other disturbances of the night before. (A-5.)

When Bias left the neighbors' home at approximately 10:35 p.m., he heard shouting coming from Curnow's home. (*Id.*) Bias walked across the common driveway, looked into Curnow's window and saw Curnow bent over Taylor slapping and shaking Taylor and pleading

with her to wake up. Bias heard Curnow exclaim, "I'll get these fuckers for this." Bias returned to the patrol car and called for backup. (*Id.*)

Luarca arrived at the scene within minutes, went to the same window that Bias had looked through, and made the same observations of Curnow acting in a bizarre and threatening manner. Luarca observed Curnow shaking Taylor violently and yelling, "Please don't die. I'm sorry I did this to you." (*Id.*)

Suspecting grave injury to Taylor and/or a possible hostage situation, Bias and Luarca radioed for a supervisor and additional backup. Within a few minutes, Officer Kruger ("Kruger") and Sergeant Compton ("Compton") arrived at the scene. (*Id.*)

Compton, the commanding officer, was briefed by Bias and Luarca. Compton viewed the scene first from the window that Bias and Luarca had looked through, and then from a different window which gave him a full length view of the room. From this window Compton observed the HK-91 lying within six inches of Curnow's reach. The close proximity of the HK-91 to Curnow greatly concerned the officers because of the dangerous nature of the HK-91 weapon. With that in mind, Compton devised a plan of entry into Curnow's home. (*Id.*)

The plan devised by Compton involved stationing Luarca at the window to cover the officers as they entered Curnow's home. In the event Curnow picked up the rifle in a threatening manner, Luarca was to take appropriate action. The other three officers were to enter through the front door by breaking down the door and attempt to

rescue Taylor and prevent Curnow from using the HK-91. (*Id.*)

The plan went awry because the first attempt to break down the door failed (*Id.*) When Curnow heard persons attempting to break down the front door, he immediately reached for the HK-91. (A-6.) Seconds later, a second attempt to break down the door succeeded.

Because Curnow had already picked up the weapon and was turning as to get into a firing stance, Luarca, who was stationed at the window with his weapon trained on Curnow, broke the glass of the window and yelled, "Freeze, police." (*Id.*) At that moment, Compton and Kruger came through the front door. Curnow had his weapon in a firing position. Luarca fired in defense on the other officers. (*Id.*)

The first shot hit Curnow in the vicinity of his right elbow. Curnow managed to stay on his feet, however, and carried the weapon into the kitchen, opened up the kitchen door and exited the house. (*Id.*)

Curnow remained in possession of the HK-91 upon exiting the house. Once Curnow exited the house, he turned and pointed the weapon at Luarca. Luarca fired a second shot which hit and killed Curnow. (*Id.*)

According to the "statement" of Taylor, Curnow was not hitting her but was simply holding her in his lap. Taylor claims that Curnow did not reach for the HK-91 before the police shot him, and that it appeared Curnow was shot in the back by the first shot. She further stated

that the gun was unloaded and that Curnow grabbed it by the muzzle as he attempted to flee the residence. (*Id.*)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted on two distinct grounds. First, this Court is asked to resolve a direct conflict involving the interpretation of the Federal Rules of Civil Procedure, Rule 56(c) pertaining to summary judgment. The decision of the Ninth Circuit to deny petitioners' summary judgment based on the unsigned statement of Taylor conflicts with decisions of other courts of appeals and district courts to consider the issue. Moreover, the decision misinterprets the holding of this Court in *Celotex v. Catrett*, 477 U.S. 317 (1986).

The decision of the Ninth Circuit is particularly troublesome because it sends a message that any statement or document submitted by counsel in opposition to summary judgment, no matter how questionable its veracity, will suffice to overcome summary judgment. Relying on the statement of this Court in *Celotex* that a nonmoving party does not need to produce evidence in a form that would be admissible at trial to avoid summary judgment, the Ninth Circuit admitted a "statement" taken in question and answer format that did not qualify as a deposition, was not signed or verified by the deponent, and was not administered by a person authorized to perform the oath ceremony. In effect, the Ninth Circuit's decision renders Rule 56 a nullity.

Second, this Court is asked to reverse the decision of the district court denying summary judgment to Officers Bias, Compton and Kruger on the basis of qualified immunity. Intervention by this Court is necessary because the Ninth Circuit neglected to consider petitioners' argument that, because Officers Compton, Bias and Kruger participated only in the initial entry into Curnow's home and because they did not fire either of the shots that caused the death of Curnow, they were entitled to summary judgment on the basis of qualified immunity. Even if this Court considers the statement of Taylor, respondents submitted no evidence indicating that Officers Bias, Compton and Kruger acted outside the scope of their qualified immunity.

I.

THE COURT OF APPEALS ERRONEOUSLY CONSIDERED THE UNSIGNED STATEMENT OF TAYLOR FOR PURPOSES OF SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure allows a party to bring or defend a motion for summary judgment based on the pleadings, depositions, affidavits, and answers to interrogatories and admissions on file. (Fed. Rules Civ.Proc., Rule 56(c).)

The statement of Taylor proffered by respondents in opposition to petitioners' motion for summary judgment appears in question and answer format similar to a deposition transcript, transcribed from shorthand into typewriting by a "shorthand reporter." The statement is not signed by Taylor. Petitioners' counsel were not notified of

the questioning and were not present when respondents' counsel questioned Taylor.

In order to be admissible as a deposition under Rule 56(c), opposing counsel must have an opportunity to cross-examine the deponent. (See Fed. Rules Civ.Proc., Rule 32(a).) Because petitioners' counsel were not notified of Taylor's questioning, Taylor's statement is inadmissible as a deposition for purposes of summary judgment. (*Id.*) In order to be considered for purposes of summary judgment, therefore, this Court must find that Taylor's statement qualifies as an admissible affidavit. (See Fed. Rules Civ. Proc., Rule 56(3).)

An affidavit is a "written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. (*Knight v. State,* 219 Kan. 863 [549 P.2d 1397, 1401] (1991) [Emphasis added.]. See also *Black's Law Dictionary,* 5th Ed., p. 54.) In short, an affidavit must be (1) signed by the person making it; and (2) notarized by a person having authority to administer the oath. (*Henderson v. Clark Oil and Refining Corp.,* 639 F.Supp. 105, 108 (N.D. Ill. 1986).)

A. An Unsigned Affidavit Is Not Admissible Evidence Under Rule 56(c).

The Ninth Circuit found that, under Rule 56(c), Taylor's testimony was the substantial equivalent of an affidavit. (A-9.) Thereafter, the court held that the district court "properly considered Taylor's statement pursuant

to Rule 56(c) because her answers to the questions were given under oath." (*Id.*) The court found Taylor's statement to be "at least as reliable as an affidavit," notwithstanding the fact that the statement was unsigned. (*Id.*)

The Ninth Circuit cited two of its previous cases, *Hoover v. Switlik Parachute Co.*, 663 F.2d 964 (9th Cir. 1981), and *In re Sunset Bay Associates*, 944 F.2d 1503 (9th Cir. 1991), in support of its ruling. In *Hoover*, the Ninth Circuit admitted depositions for the purpose of summary judgment that were taken without an opportunity for the opposing party to cross-examine the deponents. The *Hoover* court held that, while the documents could not be admitted as Rule 56(c) depositions, they met the requirements for Rule 56(c) affidavits since they were made on personal knowledge and set forth facts in evidence. (*Hoover, supra*, 663 F.2d at 966.)

Thereafter, the court in *Sunset Bay* took the logic behind *Hoover* one step further. The court concluded that a witness statement taken in question and answer form, which was not subject to cross-examination nor signed, was admissible under Rule 56(c). The court explained its decision as an application of the "pragmatic" approach to consideration of unverified materials; namely, whether the document "is at least as reliable as an admissible affidavit." (*Sunset Bay, supra*, 944 F.2d at 1509-1510.) The court found that the document was reliable because the deponent was *sworn*, even though the document was unsigned.

The decision of the Ninth Circuit to admit the unsigned statement of a witness for purposes of summary

judgment is in conflict with the decisions of the courts in most, if not all, of the other circuits to consider the issue. Decisions of district courts in those circuits further highlight the split among the federal courts.[1]

For example, in *Mason v. Clark*, 920 F.2d 493 (8th Cir. 1990), the Eighth Circuit held that an unsigned affidavit did not constitute evidence in support of a motion for summary judgment. As explained by the court, "an 'unsigned affidavit' is a contradiction in terms. By definition an affidavit is a 'sworn statement in writing made . . . under an oath or on affirmation before . . . an

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[1] See *Marvel v. Lasher*, 129 B.R. 27 (D. Del. 1991) ("[i]n considering motion for summary judgment, the court will consider admissions, depositions and exhibits thereto and *signed* affidavits on file") [emphasis added]; *Gondre v. Silberstein*, 744 F.Supp. 429, 434-35 n.9 (E.D.N.Y. 1990) (plaintiff's submission of unsigned letter could not serve as basis for summary judgment motion on contested issue); *Henderson v. Clark Oil and Refining Corp.*, 639 F.Supp. 105, 108 (N.D. Ill. 1986) (where defendants' affidavit was neither signed nor notarized, court refused to consider it, citing Rule 56(3)); *Westland Energy 1981-1 Ltd. v. Bank of Commerce*, 603 F.Supp. 698, 713 (N.D. Okla. 1984) (district court refused to consider unsigned affidavit filed in support of summary judgment motion); *Faraciano v. Miller Brewing Co.*, 582 F.Supp. 1262, 1264 (E.D. Wis. 1984) (declaring affidavit offered by plaintiff in opposition to summary judgment motion to be "of dubious evidentiary value" where exhibit attached to it was unsigned and undated and supposedly recorded the statement of another unknown and unidentified individual); *Flintkote Co. v. United States*, 47 F.R.D. 322, 324-25 (S.D.N.Y. 1969) (finding that unsigned document purportedly sworn to by company's president did not "set forth facts 'admissible in evidence' as required by Rule 56(e) and therefore would not be considered"), *aff'd*, 435 F.2d 556 (2d Cir.), *cert. denied*, 402 U.S. 994 (1971).

authorized officer.' " (920 F.2d at 495 [citing *Webster's Third New International Dictionary* (1965) at p. 35].)

Likewise, the Third Circuit in *Pension Benefit Guaranty Corp. v. Heppenstall Co.*, 633 F.2d 293 (3rd Cir. 1980), held that an unsigned affidavit could not be admitted into evidence and therefore could not provide any basis for denying a summary judgment motion. (633 F.2d at 300.) In *Mark v. Furay*, 769 F.2d 1266 (7th Cir. 1985), the Seventh Circuit affirmed, without passing specifically upon, the district court's refusal to consider an unsigned witness statement offered by plaintiff in granting summary judgment for police officers.

The Ninth Circuit cited as support for its ruling in this case the Supreme Court's *Celotex* decision. (A-7.) The *Celotex* court stated in dicta that a nonmoving party need not "produce evidence in a form that would be admissible at trial" in order to avoid summary judgment. (*Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).) A careful reading of *Celotex*, however, reveals that the case does not support the Ninth Circuit's ruling.

The plaintiff in *Celotex*, pursuing a wrongful death action, did not have personal knowledge that would connect her husband's injuries to any Celotex product. In response to Celotex's motion for summary judgment, however, she produced three documents that she claimed established the existence of a genuine material factual dispute: a transcript of her husband's deposition, a letter from an official of a former employer of her husband, and a letter from an insurance company. Celotex argued successfully at the district court level that it was entitled to summary judgment not because plaintiff did not have

personal knowledge of facts that would support her claim, but rather because the only evidence that she proffered was *inadmissible.* (*Celotex, supra,* 477 U.S. at 320.)

The decision of the court of appeals and the Supreme Court did not address the issue of whether plaintiff's proffered evidence was admissible, however.[2] Instead, the Supreme Court limited its consideration to the issue of whether a party moving for summary judgment must come forward with proof of the absence of any genuine issues of material fact before the nonmoving party is required to respond. The Court concluded that summary judgment is appropriate whenever the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof regardless of whether the moving party supports its motion with evidence negating the nonmovant's claim. (477 U.S. at 324.)

The important issue in this case, whether an unsigned affidavit is admissible evidence for purposes of summary judgment under Rule 56(c), was not addressed by the *Celotex* court. The Supreme Court stated only that evidence need not be in a form "that would be admissible at trial." (*Id.*) [Emphasis added.] The decision of the Ninth Circuit in this case misconstrues *Celotex* and is in conflict with the majority of district and appellate courts

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[2] The Supreme Court explicitly declined to evaluate the substance of Celotex's motion, observing that "the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance." (477 U.S. at 327.)

that have ruled on the admissibility of unsigned affidavits.

B. No Evidence in the Record Indicates that Coil Was Authorized to Administer an Oath or That She Accurately Transcribed Taylor's Statements.

The unsigned statement of Taylor was taken down by Kristin Coil, shorthand reporter, and reduced to typewriting. (C-3.) The last page of the statement indicates that Taylor was "duly sworn to testify the truth, the whole truth and nothing but the truth" by Coil. (*Id.*) The last page is signed by Coil in her capacity as a "shorthand reporter."

The Ninth Circuit upheld the district court's decision to consider the unsigned statement of Taylor because "her answers to the questions were given under oath." (A-9.) Since Taylor's statement was sworn, the court held that it "was at least as reliable as an affidavit." (*Id.*)

This presumption of reliability is erroneous for two reasons. First, no evidence in the record indicates that Coil is an "officer of the court" possessing authority to administer an oath. Second, even if Taylor believed she was under oath when giving her statement, there is no evidence in the record indicating that Coil accurately transcribed Taylor's statement from shorthand since Taylor never reviewed, verified nor signed the statement. (C-3.) Accordingly, Taylor's statement is inherently unreliable, is not admissible evidence, and should not have been considered by the court in denying summary judgment.

As a general rule, an officer or any other person has only the authority, if any, to administer oaths or affirmations as is conferred by constitution or statute. (67 C.J.S., Oaths and Affirmations, § 4, p. 4.) Under California law,[3] only certified shorthand reporters have the power and authority to administer oaths or affirmations and perform the duties of a deposition officer. (Cal. Code Civ. Proc., § 2093.) Since the record does not indicate that Coil was a certified shorthand reporter, she had no authority to administer an oath to Taylor and the court has no assurance as to the manner in which the oath was administered.

Moreover, no evidence in the record indicates that Coil accurately transcribed Taylor's answers to the questions asked by counsel during her interview. Taylor did not sign the statement to verify that she had read the typewritten statement and the answers contained therein were true and correct.

Affidavits are the least trustworthy basis on which to render a summary judgment. (*Long v. Bureau of Economic Analysis,* 646 F.2d 1310 (9th Cir. 1981).) Taylor's statement is even less trustworthy than the typical affidavit because it contains none of the indicia of reliability generally associated with a deposition or an affidavit, as explained above. It clearly would not be admissible at trial and it should not have been considered by the court on summary judgment.

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[3] Since California was the place where the examination was held, California law is controlling on this issue. (Fed. Rules Civ. Proc., Rule 28(a).)

II.

THE COURT OF APPEALS ERRED IN NOT GRANTING SUMMARY JUDGMENT TO OFFICERS COMPTON, KRUGER AND BIAS ON THE BASIS OF QUALIFIED IMMUNITY

The district court expressly held in its March 3, 1989, Order that the entry into Curnow's home by Officers Compton, Kruger and Bias was reasonable. (B-6.) The district court denied summary judgment on the basis of qualified immunity as to all of the officers, however. (B-7.) The Ninth Circuit apparently neglected to consider petitioners' argument that, because the three officers listed above participated only in the initial entry into Curnow's home and because they did not fire either of the shots that caused the death of Curnow, they were entitled to summary judgment on the basis of qualified immunity.

Police officers enjoy a qualified or "good faith" immunity from suit for damages. (*Sheuer v. Rhodes* (1974), 416 U.S. 232.) As a general rule, mere presence at the scene, without a showing of direct responsibility for the action, will not subject an officer to liability. (*Rizzo v. Goode* (1976), 423 U.S. 362.)

For example, in *Ghandi v. Police Dept. of City of Detroit*, 747 F.2d 338 (6th Cir. 1984), the Sixth Circuit affirmed the grant of summary judgment to officers asserting entitlement to qualified immunity on the basis of unrefuted evidence that the officers were merely backups who did not actually participate in the illegal search. (747 F.2d at 352.) Likewise, in *Hamrick v. Lewis*, 539 F.Supp. 1166 (N.D. Ill. 1982), the court granted summary

judgment to officers who played no part in the allegedly illegal actions of other officers leading to the death of a criminal suspect. The court found that their involvement "was limited to . . . watch[ing] the side and rear of [the suspect's] house while the other officers actively participated in the events that resulted in [the suspect's] death." (539 F.Supp. at 1170-1171.)

In a case on point, *Rogers v. Fuller*, 410 F.Supp. 187 (M.D.N.C. 1976), the district court granted summary judgment in favor of a police officer in a section 1983 action where, in support of the summary judgment motion, the police officer filed affidavits showing that he did not participate in the allegedly illegal search and seizure and that he acted under lawful authority and in good faith throughout the events in question. Because the plaintiffs' response to the motion contained no counter-evidence, the court granted the motion. (410 F.Supp. at 189-190.)

In this case, defendants filed three signed, sworn declarations by Officers Bias, Compton, and Luarca, stating that Bias, Compton and Kruger participated only in the initial entry into Curnow's home. Even if the court considers the unsigned statement of Taylor, respondents presented no evidence contradicting the declarations of the officers evidencing that they did not culpably participate in or encourage the acts or decisions directly responsible for Curnow's death.

Specifically, the declaration of Bias shows that Bias never entered Curnow's home (although under Compton's plan he was meant to do so), and never fired any shots at Curnow.

The declaration of Compton shows that Compton entered Curnow's home to rescue Taylor but did not fire any shots. Likewise, the declarations show that Kruger entered Curnow's home but did not fire any shots. Only Luarca fired any shots, and he alone caused Curnow's death. (See C-2.)

Based on these facts as presented in petitioners' motion for summary judgment, the district court's denial of summary judgment to all defendants was in error. The record contains no evidence that Officers Compton, Kruger and Bias acted outside the scope of their qualified immunity. They had no direct involvement in firing the shots that caused the death of Curnow and are therefore entitled to qualified immunity.

CONCLUSION

Intervention by this Court is required to (1) resolve the conflict in the courts as to whether an unsigned affidavit is admissible under Rule 56(c); and (2) reverse the ruling of the district court denying summary judgment on the basis of qualified immunity to Officers Compton, Bias and Kruger.

DATED: July 1, 1992

Respectfully submitted,

WAYNE LEMIEUX

Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH CHRISTOPHER CURNOW, a minor, by and through his guardian ad litem, SANDRA CURNOW; KEN CURNOW, SHEILA EFFLANDT; SANDRA CURNOW, as administratrix of the estate of STEVEN MURRAY CURNOW, deceased; CRIS CURNOW; and SANDRA CURNOW, as an individual,

Plaintiffs-Appellees,

v.

THE RIDGECREST POLICE, a municipal law enforcement agency; THE CITY OF RIDGECREST, a municipal corporation; THE STATE OF CALIFORNIA, a sovereign state; THE COUNTY OF KERN, a municipal corporation; EDWARD JOHN LUARCA; a/k/a E.J. LUARCA; STEPHEN COMPTON; RANDY GENE BIAS; JEFFREY KRUEGER; KURT FOWLER; JERRY LINENKUGEL; GARRY DAVIS; CHRIS DAVIS; BOB PRATT and EDWARD R. JAGELS,

Defendants-Appellants.

No. 90-15314

D.C. No. CV-F-86-602-REC

OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Submitted May 16, 1991*
San Francisco, California

Filed December 26, 1991

Before: Arthur L. Alarcon, Pamela Ann Rymer, Circuit Judges, and Alan A. McDonald**, District Judge.

Opinion by District Judge McDonald

SUMMARY

Constitutional Law/Courts and Procedure

Affirming a district court denial of summary judgment based upon qualified immunity, the court of appeals held that a statement given in opposition to a motion for summary judgment had been properly considered under Fed. R. Civ. P. 56(c), even though unsigned, because it was at least as reliable as an affidavit.

Kenneth Christopher Curnow, a minor, and Sandra Curnow sued appellants Ridgecrest police officer for the

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* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

** The Honorable Alan A. McDonald, United States Judge for the Eastern District of Washington, sitting by designation.

killing of Steven Curnow (Sandra's husband). A "statement" submitted in opposition to appellants' motion for summary judgment, given under oath but unsigned, contradicted the affidavits submitted by the police officers. Appellants objected to the district court's consideration of this statement in denying their motion.

COUNSEL

Dorothy Crisp, Wayne K. Lemieux, Westlake Village, California, for the defendants-appellants.

Carl K. Osborne, Los Angeles, California, and Elliott L. Aheroni, Encino, California, for the plaintiffs-appellees.

OPINION

McDONALD, District Judge:

Defendants appeal the district court's denial of their motion for summary judgment based upon qualified immunity. We affirm.

Plaintiffs-appellees, the estate of Steven Curnow, his parents and his children, filed this action in the United States District Court for the Eastern District of California against the defendants-appellants, City of Ridgecrest police officers. The claims which are the subject of this appeal are brought pursuant to 42 U.S.C. §§ 1981, 1983, and 1985.

After plaintiffs-appellees filed their third amended complaint, defendants-appellants moved for summary judgment on the basis of qualified immunity. The district court denied defendants-appellants' motion on the basis

that genuine issues of material facts precluded issuance of summary judgment.

According to defendants-appellants, on April 5, 1986, at approximately 10:00 p.m. the decedent, Steven Curnow, and Mercedes Taylor were standing in the kitchen of Curnow's home when a window was shattered by an object from outside the home. Curnow and Taylor both believed that someone had shot at them and therefore, called the police department. As plaintiffs-appellees admit, Curnow then retrieved an HK-91, semi-automatic rifle, from the closet.

Upon arrival at the scene, the police questioned the occupants of a house next to Curnow's before proceeding to Curnow's residence.

After examining the broken window and determining that shots were fired, the police were allowed to enter the house and continue the investigation. Curnow showed Officer Randy Bias the HK-91 and asked Bias if it was legal to have such a weapon. Bias informed Curnow that it was.

During the investigation Bias learned that Taylor had been threatened by her ex-husband. After the officers left the scene, Officer Edward Luarca went to Taylor's ex-husband's residence to question him. Taylor's ex-husband denied any involvement with the breaking of the window.

Upon writing his report of the incident, Officer Bias was ordered by his supervisor to contact the neighbors at 421 Florence to determine if they saw anything or knew anything about the window-breaking incident.

On the following evening, April 6, 1991, Officer Bias interviewed the neighbors regarding any noise they might have heard or any other disturbances of the night before. When Bias left the neighbor's home he heard shouting coming from Curnow's home. He walked across the common driveway, looked into Curnow's window and allegedly saw Curnow bent over Mercedes Taylor slapping and shaking Taylor and pleading with her to wake up. Bias then returned to the patrol car and called for backup. Officer Luarca arrived at the scene, went to the same window that Officer Bias had looked through and saw the same thing that Bias had seen.

Bias and Luarca both decided they needed a supervisor and additional backup. Bias radioed for a supervisor and backup. Soon thereafter, Officer Krueger and Sergeant Compton arrived at the scene. Compton, the commanding officer, viewed the scene and allegedly observed the HK-91 laying at the side of the decedent. Purportedly there was great concern among the officers because of the nature of the HK-91 weapon.

Compton then devised a plan of entry into Curnow's home. The plan involved stationing Luarca at the window and having him aim his weapon at Curnow. In the event Curnow picked up the rifle in a threatening manner, Luarca was to take appropriate action. The other three officers were to enter through the front door by breaking down the door and attempt to rescue Taylor and prevent Curnow from using the HK-91.

The plan allegedly went awry in that the first attempt to break down the door failed. When Curnow heard persons attempting to break down the front door, he

allegedly reached for the HK-91. The police then made a second attempt to break down the door which succeeded. Because Curnow had already picked up the weapon, Luarca, who was stationed at the window with his weapon trained on Curnow, yelled "freeze, police". At that moment, Compton and Krueger came in through the front door. Curnow raised his weapon and Luarca fired in defense of the other officers.

As a result of the first shot, Curnow was seriously wounded. While carrying his rifle, Curnow ran into the kitchen, opened the kitchen door and exited the house. Upon exiting the house, he was in possession of the HK-91. As Curnow exited the house he turned and pointed the weapon at Officer Luarca. Officer Luarca then fired a second shot which hit and killed Curnow.

The "statement" of Mercedes Taylor in opposition to the motion for summary judgment contradicts the affidavits submitted by the police officers. According to Taylor's statement, Curnow was not hitting her but was simply holding her in his lap. She said that Curnow did not reach for his gun before the police shot him, and that it appeared Curnow had been shot in the back by the first shot. She further stated that the gun was unloaded and that he grabbed it by the muzzle as he attempted to flee the residence.

I.

This court has jurisdiction over an appeal from a denial of motion for summary judgment based upon qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We review *de novo* the district court's denial of

summary judgment. *White by White v. Pierce County*, 797 F.2d 812, 814 (9th Cir. 1986).

II.

Defendants object to the district court's consideration of Mercedes Taylor's statement submitted by the plaintiff in opposition to the defendant's motion for summary judgment. Kristin Coil, a shorthand reporter, took Taylor's statement on May 6, 1986. Taylor was duly sworn to tell the truth by Coil. Defense counsel were not present when plaintiff's counsel questioned Taylor. Coil transcribed the questions and Taylor's responses. The transcript was signed by Coil but not by Taylor.

In opposing a summary judgment motion, the nonmoving party need not produce evidence in a form that would be admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1985). A summary judgment motion may be opposed by any of the evidentiary materials listed in Rule 56(c) of the Federal Rules of Civil Procedure, although the mere pleadings themselves are not sufficient. *Id.* 56(c) provides that the court may consider pleadings, depositions, answers to interrogatories, admissions and affidavits in deciding a summary judgment motion. Fed. R. Civ. P. 56(c).

In *Hoover v. Switlik Parachute Co.*, 663 F.2d 964 (1981), we admitted depositions for the purpose of a summary judgment motion against a party who had not been joined at the time the depositions were taken. *Id.* at 966. In that case, the plaintiff joined Switlik as a co-defendant after depositions had already been taken by a prior defendant. *Id.* The court prohibited Switlik from deposing

any witnesses whose depositions had already been taken by the prior defendant. *Id.* at 965-66.

We ruled that the documents could not be admitted as Rule 56(c) depositions because Switlik had no opportunity to cross-examine the deponents. *Id.* at 966. Nevertheless, we held that the documents met the requirements for Rule 56(c) affidavits since they were made on personal knowledge and set forth facts in evidence. *Id.* Although the documents were inadmissible as depositions, we rule that the district court did not err in considering the deposition testimony as the substantial equivalent of an affidavit under Rule 56(c). *Id.* at 967.

In re Sunset Bay Associates, Nos. 89-55705 and 89-55707, 13329 (9th Cir. Sept. 24, 1991), we concluded that a witness's statements taken in question and answer form, which had neither been subject to cross-examination nor signed, were admissible under Rule 56(c). *Id.* at 13341. It is unclear from the facts set forth in *In re Sunset Bay Associates* whether the party objecting to the admission of the statement had been notified of the deposition or was present at the time it was taken. We explained our holding in *In re Sunset Bay Associates* as follows:

> [T]he logic of *Hoover* implies that an unsigned deposition should be admissible where, as here, the deponent was *sworn*. The approach of *Hoover* is pragmatic, looking to see if the deposition testimony is at least as reliable as an admissible affidavit. Because there is no reason to believe that the sworn answers to questions are less reliable than an affidavit, to the extent that the content of the deposition testimony is otherwise

> admissible, that testimony should be admissible on summary judgment.

Id. at 13341.

The district court properly considered Taylor's statement pursuant to Rule 56(c) because her answers to the questions were given under oath. Notwithstanding the fact that the statement was unsigned, it was at least as reliable as an affidavit.

III.

Defendants-appellants moved for summary judgment on the basis of qualified immunity. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages [in a section 1983 action] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

This "clearly established law" test requires more than an alleged "violation of extremely abstract rights." *Anderson v. Creighton,* 483 U.S. 635, 639 (1987). Rather, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. In other words, "in the light of preexisting law the unlawfulness must be apparent." *Id.*

There is no question that the apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner,* 471 U.S. 1, 7 (1985). The nature and the quality of the

intrusion on the individual's Fourth Amendment interests must be balanced against countervailing governmental interests. *Id.* at 8; *United States v. Place,* 462 U.S. 696, 703 (1983). The court's inquiry is therefore whether the totality of the circumstances (taking into consideration the facts and circumstances of the particular case; including the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether he is actively resisting arrest or attempting to evade arrest by flight) justified the particular type of seizure. *Tennessee v. Garner,* 471 U.S. at 8-9; *Graham v. Connor,* 490 U.S. 386, 396 (1990). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene. . . . " *Graham v. Connor,* 490 U.S. at 396. At the time Steven Curnow was shot, it was recognized that an officer could use deadly force to effect the arrest of a fleeing felon if, under the circumstances, he reasonably believed such force was necessary to protect himself or others from death or serious physical harm. *Tennessee v. Garner,* 471 U.S. at 11; *Ting v. United States,* 927 F.2d 1504 (9th Cir. 1991).*** Under Taylor's version of the shooting, the police officers could not reasonably have believed the use of deadly force was lawful because Curnow did not point the gun at the officers and apparently was not

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***While *Ting* was decided in 1991, the shooting which gave rise to the excessive force claim therein occurred on May 12, 1984. Accordingly, *Ting's* recognition of clearly established law regarding the use of deadly force to effect an arrest is relevant to the instant shooting which occurred in 1986.

facing them when they shot him the first time. Thus, viewing the evidence in the light most favorable to the nonmoving party, the defendants-appellants are not entitled to qualified immunity.

IV.

Defendants-appellants finally claim the district court erred in not dismissing claims made by Curnow's parents and children. Defendants-appellants argue that the recent Supreme Court case of *Graham v. Connor, supra,* mandates that excessive force claims be brought under the Fourth Amendment. There is no mistaking the holding of *Graham v. Connor:*

> Today we make explicit what was implicit in *Garner's* analysis, and hold that all law enforcement officers have used excessive force – deadly or not – in the course of the arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provided an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims. [footnote omitted]

Id. at 395.

While the person who claims excessive force was directed at him or her can only raise a fourth amendment claim, a parent who claims loss of the companionship and

society of his or her child, or vice versa, raises a different constitutional claim. The Ninth Circuit recognizes that a parent has a constitutionally protected liberty interest under the Fourteenth Amendment in the companionship and society of his or her child, *see Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986); *Kelson v. City of Springfield*, 767 F.2d 651, 653-55 (9th Cir. 1985), and that a "child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest," *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir.), *cert. denied*, 484 U.S. 935 (1987). Thus, *Graham v. Connor* does not bar the parents' and children's due process claims. The district court recognized these authorities and properly denied defendants-appellants' motion for summary judgment based thereon.

The order of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH CHRISTOPHER CURNOW, a minor, by and through his Guardian ad litem, SANDRA CURNOW; KEN CURNOW; SHEILA EFFLANDT; SANDRA CURNOW, as Administratrix of the Estate of STEVEN MURRAY CURNOW, Deceased; CHRIS CURNOW; and SANDRA CURNOW, as an individual, Plaintiffs, v. THE RIDGECREST POLICE, a Municipal Law Enforcement Agency; THE CITY OF RIDGECREST, a Municipal Corporation; THE STATE OF CALIFORNIA, a Sovereign State; THE COUNTY OF KERN, a Municipal Corporation; EDWARD JOHN LUARCA aka E.J. LUARCA; STEPHEN COMPTON; RANDY GENE BIAS; JEFFREY KRUGER; KURT FOWLER; JERRY LINENKUGEL; GARRY DAVIS; CHRIS DAVIS; BOB PRATT and EDWARD R. JAGELS, Defendants.	NO. CV-F-86-602 REC DECISION AND ORDER RE MOTIONS TO DISMISS, TO STRIKE, AND FOR SANCTIONS

On December 19, 1988 the court heard defendants' Motions to Dismiss, to Strike, and for Sanctions. Upon due consideration of the written and oral arguments of the parties, the court now enters its order as set forth herein.

Defendants Ridgecrest Police Department, City of Ridgecrest, and Officers Luarca, Compton, Bias and Kruger move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the action for failure to state a claim upon which relief can be granted. Defendants also move, pursuant to Rule 12(f), to strike certain portions of the Third Amended Complaint and, pursuant to Rule 11, for sanctions against plaintiffs.

I. Statement of Facts.

This action stems from the shooting death of Steven Curnow, a resident of Ridgecrest, California. The Third Amended Complaint sets forth the facts of the case. On April 5, 1986 at approximately 10:00 p.m. decedent and Mercedes Taylor were standing in the kitchen area of decedent's residence when the window in the kitchen broke out and both were showered with glass. Decedent and Taylor believed that someone had shot at them. They retreated to another room where a telephone was located. Taylor called the police while decedent went to the closet to retrieve a rifle. Decedent allegedly told the police about the rifle.

The police arrived, but went to the wrong house. They allegedly ordered that residence's occupants out of the house at gunpoint. After discovering their mistake, they then went to decedent's residence next door. The

Complaint states that contact was made with decedent after which the police concluded that no shots had been fired, but that it was simple vandalism. The police apparently entered the house to investigate. The Complaint alleges that decedent showed his rifle to Officer Bias who told decedent that it was legal to have. The police also allegedly learned that Taylor had previously been threatened by her ex-husband, that she believed he was responsible for the incident and could return, and that this was the reason for the rifle.

The next day, April 6, 1988, the police returned to the scene. Decedent and Taylor had gone to a bar that evening, and Taylor allegedly was intoxicated. Decedent took Taylor to his residence and placed her on his living room floor. While the police had been reinterviewing the neighbors, they walked across the common driveway and looked through decedent's window. They saw decedent bent over Taylor. The police allege that decedent was slapping Taylor in the face saying "Wake up!", that he was gesturing into the kitchen as if another person were present, and that Taylor appeared to be unconscious. The police then called for backup. After backup officers arrived, the police again peered into the house and saw a weapon lying on the floor. They concluded Taylor was the victim of a homicide.

The police devised a plan of entry to break down the door. It is at this point, however, that the crucial facts are disputed. As the police entered, they contend decedent grabbed for the weapon. They contend they then shot him in the arm and back. Plaintiffs, however, contend that defendants simply broke down the door and began shooting. Plaintiffs argue that as decedent then turned to

flee, the police shot him again. Plaintiffs claim that his death constituted a violation of their civil rights under 42 U.S.C. §§ 1981, 1983 and 1985.

II. Motion to Dismiss.

A. Qualified Immunity.

Ridgecrest Police Officers Luarca, Compton, Kruger and Bias claim qualified immunity as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Harlow* holds that where an official duty legitimately requires discretionary action, the officials are qualifiedly immune as long as their actions do not violate clearly established law. If the officials knew, should have known, or intended that their actions would violate plaintiff's rights, the immunity will not be available. qualified immunity is a "good faith" defense. Therefore, subjective aspects involved in this defense such as the officers' experiences, values and emotions must be considered.

1. Fourth Amendment Issues.

Plaintiffs allege that their Fourth Amendment rights were violated when the officers came onto decedent's property, looked into his house through a window, broke down the door, entered the house, and shot decedent who subsequently died. The question is whether those actions were justified under the circumstances.

The case of *Mincey v. Arizona*, 437 U.S. 385 (1978), is relevant to this determination. In that case, the Court stated that when the police come upon the scene of a

homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. The need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal absent an exigency or emergency. Warrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. *Id.*

Although the police did not know whether Taylor was actually dead or not, *Mincey* states that numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. *People v. Hill,* 12 Cal.3d 731-753-57 (1974); *People v. Mitchell,* 39 N.Y. 2d 173, *cert. denied,* 426 U.S. 953 (1976); *Wayne v. United States,* 318 F.2d 205 (D.C. Cir. 1963). The case of *People v. Hill, supra,* is similar to the instant case. In *Hill,* the police were notified of a shooting and dispatched officers to investigate the incident. Upon arrival at the scene, the police peered through a porch window inside the house. The *Hill* court held that:

> The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others . . . Under the circumstances, it was reasonable for the officers to believe that the shooting may have resulted in other casualties in addition to that reported to the police and that an immediate entry was necesasary [sic] to render aid to anyone in distress.

The ultimate question, then, is whether the officers reasonably believed that Taylor was in need of immediate aid or that they needed to act to prevent serious injury.

There are two separate events which must be analyzed in order to determine if plaintiffs' Constitutional rights have been violated. The first event is the entry into the house. When police looked through the window they observed Taylor on the floor apparently unconscious, decedent bent over her, and a weapon near them on the floor. They did not know the condition of Taylor, or if others were in the house. The police had been called to this residence the day before to investigate a possible shooting later determined to be vandalism. The police allegedly knew that Taylor was afraid of her ex-husband who she believed was responsible for the incident. These observations and information, coupled with the other allegations of fact concerning the situation as it appeared to police, would be sufficient to give them cause to believe that an immediate entry was necessary. Consequently, their action in entering the residence did not violate clearly established law.

However the second event involved, the actual shooting of decedent, is much more troublesome. Here, the facts necessary for a proper determination of this issue are in dispute. If decedent did in fact reach for the weapon upon the police's entry into the house, their subsequent shooting would be justified. However, for purposes of a motion to dismiss, the allegations of plaintiffs' Complaint must be taken as true with all doubts and inferences resolved in their favor. If in fact, as plaintiffs contend, decedent did not reach for the weapon, there

would be no justification for his shooting death. In addition, the propriety of defendants' shooting decedent as he fled, if true, is also questionable. Such actions would violate clearly established law and, hence, qualified immunity would no longer be available. Consequently, plaintiffs do allege facts sufficient to state a claim and the motion to dismiss as to the police officers must be denied.

B. Municipal Liability.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), the Court held that municipalities can be held liable for a constitutional tort committed by its employees if the actions constituting the tort were taken pursuant to an official policy, custom or practice promulgated by the municipality. Vicarious liability or respondeat superior is not enough. Yet even a single decision made by the officials responsible for setting policy is enough to subject the municipality to liability. *Owen v. City of Independence*, 445 U.S. 622 (1980). However, it has been held that an unjustified shooting by a police officer cannot, without more, be thought to result from official policy. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

Defendants do not even address the municipal liability issue, apparently based upon their belief that the officers are qualifiedly immune. If the officers are qualifiedly immune, then the municipality would not be liable. However if immunity is not available, then the municipality would be potentially liable if the actions were taken pursuant to official policy or practice.

Plaintiffs allege in the Complaint that the officers were acting pursuant to official policy, custom and practice of the police department. They allege that the officers acted under instructions and directions of the department, a result of municipal policy. They also allege that superior and supervising officers, those responsible for the final decision, decided to enter the house. Yet the entry has been found to have been justified. Therefore, in order to hold the police department and the city liable, plaintiffs must show that the shooting was the result of official policy. This they have failed to allege. Even if their version of the facts is taken as true, they have not specifically alleged that official policy instructs officers to shoot under the circumstances involved. Consequently, the court finds that the *Oklahoma City* case disposes of this issue in the city and department's favor, and the motion to dismiss as to defendants Ridgecrest Police Department and the City of Ridgecrest is granted.

III. Motion to Strike.

Defendants argue that plaintiffs may not allege conspiracy since that claim was dismissed with prejudice from the Original Complaint on a motion to dismiss. However plaintiffs argue that conspiracy was realleged in the First Amended Complaint, and defendants' motion for judgment on the pleadings was denied as to that claim. Upon review of the files, the court finds that the order regarding defendants' motion to dismiss the Original Complaint was granted, but with leave to amend. Its reallegation was proper, and the denial of judgment on

the pleadings then preserved it. Consequently, the conspiracy claim brought in the Third Amended Complaint is proper. Defendants' motion to strike is denied.

IV. Rule 11 Sanctions.

Defendants request sanctions on a number of bases. While they first contend that the conspiracy issue was barred, the court has determined that it was not. They then point to plaintiffs' failure to draft the Second Amended Complaint correctly. They contend that they called plaintiffs' counsel about this matter, but that they filed the motions to strike and for a more definite statement when plaintiffs' counsel didn't respond. The hearing on these motions was rescheduled so that plaintiffs could rewrite the Complaint. Because of these delays due to plaintiffs' failure to properly plead, defendants request sanctions.

While the court finds that plaintiffs' failure to correctly plead their case has resulted in a waste of judicial time and resources, the court finds that defendants are also at fault. Their allegation that the conspiracy claim was dismissed with prejudice is blatantly incorrect. The order as to the Original Complaint granted their motion to dismiss, but with leave to amend. Their motion for judgment on the pleadings was denied as to this claim. Therefore, such contention is false and could have easily been discovered, although they should already have known. Consequently, both parties are responsible for the delay involved in this case. The parties shall comply with the rules of this court in the future, or sanctions will be imposed by the court's own motion.

Thus, the court finds that plaintiffs do allege facts which, when all doubts and inferences are resolved in their favor, are sufficient to state a claim for relief against the individual officers. However, plaintiffs have failed to show that the shooting was the result of official policy or custom of the municipalities. In addition, the court finds that the conspiracy claim was properly realleged.

ACCORDINGLY, IT IS ORDERED that defendants' Motion to Dismiss is granted as to the Ridgecrest Police Department and the City of Ridgecrest and denied as to Officers Luarca, Compton, Bias and Kruger, the Motion to Strike is denied, and the Motion for Sanctions is also denied.

DATED: March 3, 1989.

/s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge

[Illegible]	)	
	)	
vs	)	CASE NO.
RIDGECREST POLICE,	)	CV-F-86-602-REC
et al	)	
	)	

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California. That on 3/3/89 I served a copy of the attached

by placing said copy in a postage-paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the United States Mail at Fresno, California, or by placing said copy into an inter-office delivery receptacle located in the Clerk's Office.

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1157 S. Beverly Blvd.
Los Angeles, CA 90035

ELLIOTT L. AHERONI
16311 Ventura Blvd.
Suite 1050
Encino, CA 91436-2183

RICHARD HAMLISH
200 N. Westlake Blvd.
Suite 109
Westlake Village, CA 91362

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DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KENNETH CURNOW, et al., Plaintiffs, v. THE RIDGECREST POLICE, et al., Defendants.	No. CV-F-86-602 REC ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Feb. 15, 1990)

On February 12, 1990 the court heard defendants' Motion for Summary Judgment. Upon due consideration of the written and oral arguments of the parties and the record herein, the court denies the motion in part and grants it in part as set forth herein.

Defendants move for summary judgment on the ground that the individual officers are entitled to qualified immunity. Alternatively, defendants move to dismiss all plaintiffs to this action except the Estate of Steven Murray Curnow.

A. Qualified Immunity.

1. Consideration of Evidence.

In moving for summary judgment, defendants have submitted declarations executed by defendants Edward John Luarca, Randy Bias and Stephen Compton. Plaintiffs

object to the court's consideration of each of these declarations. Each declaration avers at its conclusion as follows: "I declare under penalty of perjury that the above is true and correct except as to those items stated on information and belief, and as to those items, I believe them to be correct." Citing *Londrigan v. Federal Bureau of Investigation*, 670 F.2d 1164, 1174 (D.C.Cir. 1981), plaintiffs argue that the court must disregard these declarations for all purposes because the respective declarants do not aver that their respective declarations are based on their personal knowledge. The court has reviewed each of these declarations. It is obvious from each that each declarant is averring the actions the declarant took on the nights or what each was told or told to do on the nights in question. It cannot be disputed that each of these declarants are making assertions based on their personal knowledge. Consequently, the court does not find the absence of an averment to that effect critical.

In opposing this motion, plaintiffs have filed with the court a document captioned "Sworn Statement of Mercedes Taylor." The face page states: "SWORN STATEMENT OF MERCEDES TAYLOR, taken at 833 North Downs Street, Ridgecrest, California, commencing at 11:00 A.M., on Tuesday, May 6, 1986, before KRISTIN COIL, shorthand reporter." Taylor's "statement" really is a series of answers by her to questions posed by plaintiffs' then attorneys, Edwin K. Saul and Carl K. Osborne. The first transcribed page states: "MERCEDES TAYLOR, the witness herein, being first duly sworn, was examined and testified as follows:". Page 41 of the statement set forth the following, which statement is signed by Ms. Coil on May 14, 1986:

> I, Kristin Coil, shorthand reporter do hereby state:
>
> That prior to being examined, the witness named in the foregoing sworn statement, to wit, MERCEDES TAYLOR, was duly sworn to testify the truth, the whole truth and nothing but the truth;
>
> That said sworn statement was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting.
>
> I further state that I am not interested in the event of the action.

At page 40 of the transcription is the following assertion, which assertion has not been dated and signed by Mercedes Taylor in either the extra copy provided to the court or the original in the file:

> I, MERCEDES TAYLOR, say I have read the foregoing sworn statement and declare under penalty or perjury that my answers as indicated are true and correct.

In their reply brief that was filed two days late, defendants argue:

> The sworn statement of Mercedes Taylor was submitted by the plaintiffs. 2/ Defendants request this statement be disregarded althought [sic] most of the facts stated in her statement give credence to the declarations of Luarca, Compton and Bias.
>
> . . .
>
> 2. It must be noted here that Mercedes Taylor sued the City of Ridgecrest and these same police officers in the state court. The defendants in that case attempted to depose Taylor. She

> refused. After three motions to compel the deposition, the court imposed sanctions upon Taylor (which have never been paid) and dismissed the case for failure to produce discovery. when interrogatories were sent requesting any statements by the plaintiff (Taylor) to any person concerning this event, Taylor responded that there were none.

The court is not particularly interested in discovery problems in any other case, which problems appear to be the basis for defendants' request that the sworn statement be disregarded in this case. The court was assured by plaintiffs' counsel that he was aware of no problems preventing plaintiffs from presenting Taylor as a witness in this action. Consequently, the court considers the "sworn statement" in rulings on this motion.

2. Effect of Disputed Facts.

The court's conclusion that it will allow use of Taylor's statement presents the court with disputed material facts. In *White by White v. Pierce County*, 797 F.2d 812, 815-816 (9th Cir. 1986), the Ninth Circuit held:

> Probable cause is ordinarily a question for the jury, and denial of summary judgment is appropriate only if no reasonable jury could find that the officers had probable cause . . . We have applied this rule when determining whether officers engaging in a search had qualified immunity. *See Bilbrey v. Brown*, 738 F.2d 1462, 1467 (9th Cir. 1984). *Bilbrey* was decided before *Mitchell v. Forsyth*. In *Mitchell*, the Court stated that qualified immunity 'is in immunity from suit rather than a mere defense to liability;

> and . . . it is effectively lost if a case is erroneously permitted to go to trial.' . . . If the question of probable cause is allowed to go to the jury where qualified immunity is at issue, this defense will be effectively lost . . . Here, the existence of probable cause was to be determined by the trial court . . . .
>
> . . .
>
> The question of the reasonableness of the force used in an arrest is usually for the jury . . . However, as with probable cause, the trial court, and this court on appeal, must decide this issue on summary judgment where qualified immunity is at issue.

However, in a situation where the underlying material facts are disputed, the district court decides the issue of whether plaintiff's clearly established constitutional rights were violated by assuming that plaintiff's version of the facts is correct. In so doing, of course, the court must keep in mind that defendants have the burden of proof, *Benigni v. City of Hemet*, 853 F.2d 1519, 1525 (9th Cir. 1988),[1] and the standards governing motions for summary judgment assuming that discovery has been completed. *See DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir. 1989); *Scott v. Henrich*, 700 F.Supp. 498 (D.Mont. 1988); *Wood v. Ostrander*, 879 F.2d 583, 591, 596 (9th Cir. 1989); *Manhattan Beach Police Officers v. Manhattan Beach*, 881 F.2d 816, 819 (9th Cir. 1989); *see also Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987).

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[1] *Benigni* involves a discussion of the proper jury instructions on the issue of qualified immunity, another indication that there will be circumstances where qualified immunity cannot be resolved pretrial.

3. Excessive Force.

A law enforcement officer in a Section 1983 action in [sic] entitled to qualified immunity from liability for damages if his conduct does not violate clearly established constitutional rights of which a reasonable law enforcement officer would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court explained that the question of clearly established constitutional rights must be decided in the particular rather than the general sense and that the inquiry is totally objective, albeit fact specific.

Here, there is no question that a seizure within the meaning of the Fourth Amendment has occurred because there has been a governmental termination of freedom of movement through means intentionally applied. *Brower v. County of Inyo*, 489 U.S. ___, 103 L.Ed.2d 628 (1989). The issue here is whether the deadly force used to effectuate this particular seizure was reasonable within the meaning of the Fourth Amendment. As explained in *Graham v. Connor*, ___ U.S. ___, 104 L.Ed.2d 443, 455-456 (1989):

> Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake . . . Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . however, its proper application requires careful attention to the facts and circumstances of each particular case, including

> the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See Tennessee v. Garner . . . (the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure').
>
> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case in [sic] an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

In *Ford v. Childers*, 855 F.2d 1271, 1274-1275 (7th Cir. 1988), a case cited by defendants, the Seventh Circuit, holding that it was not necessary to pass on the constitutionality of the Illinois deadly force statute under the *Tennessee v. Garner* standard, stated in the course of concluding that

the officer's use of deadly force in that case was objectively reasonable as a matter of law, noted:

> As we recognized in another § 1983 action concerning a police shooting, a reasonable belief that danger exists may be formed by reliance on appearances . . . And as we noted today, ' "no right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts." '

Taking these facts into consideration with the sworn statement of Mercedes Taylor compels denial of this motion. Her statements, if eventually found to be true by a jury, that the decedent was not hitting her, that the police did not identify themselves before firing the first shot, that decedent was shot in the back by the first shot and inferentially did not reach for the weapon prior to the first shot, that the decedent's gun with a clip that extrudes 5 inches was unloaded, and that the decedent grabbed the gun by the muzzle as he attempted to flee the residence persuade the court that the deadly force used under these circumstances was constitutionally unreasonable.

B. Dismissal of Plaintiffs or Causes of Action.

In *Smith v. City of Fontana,* 818 F.2d 1411, 1416-1420 (9th Cir.), *cert. denied,* 484 U.S. 935 (1987), the Ninth Circuit held in pertinent part that while a decedent's estate could assert a claim on decedent's behalf for the violation of decedent's Fourth Amendment rights, the personal nature of Fourth Amendment rights precluded the children of the decedent from asserting a claim for

relief under the Fourth Amendment. The Ninth Circuit further held that the children of the decedent could state a claim for the violation of the children's substantive due process rights in being deprived of the father's continued companionship and society when the father was alleged to have been killed by excessive force by the police. However, in *Graham v. Connor*, ___ U.S. ___, 104 L.Ed.2d 443 (1989), the Supreme Court held that claims under Section 1983 that excessive force was used in seizing a person should be analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than the more generalized standard of "substantive due process" pursuant to the due process clause of the Fourteenth Amendment.

Defendants flatly contend that *Graham* compels the dismissal of all plaintiffs in this action other than the estate. At oral argument defendants expanded their argument to include certain claims made by the estate.

Plaintiffs' opposition is not very clear or to the point. First, plaintiffs state that *Smith v. City of Fontana* was based on a different set of facts involving alleged racial discrimination and has no application to this case." Plaintiffs obviously have not read *Smith* very closely. Plaintiffs further argue that "[d]efendants would do better to look to the Supreme Court case of *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) which allowed a case such as this to go forward, as have dozens and dozens of holdings." *Oklahoma City v. Tuttle* held that a single isolated incident of use of excessive force by a police officer did not establish an official policy or practice of a municipality sufficient to render the municipality liable for damages under Section

1983. It is clear that *Tuttle* is not relevant to the issue being raised by these defendants.

However, the court has some reservation that *Graham* can be given the reading defendants seek. It must be noted that in *Graham*, there was a single plaintiff. What the court thinks *Graham* is intending to hold is that the plaintiff whose Fourth Amendment rights are alleged to have been violated cannot also allege a due process violation resulting from the same acts. The court does not think the Supreme Court meant to hold that relatives cannot sue under the due process clause for the separate deprivation of their liberty interest in the society of the decedent. Consequently, only to the extent the Third Amended Complaint alleges a cause of action by or on behalf of the estate for deprivation of due process because of the acts upon which the estate's Fourth Amendment claim is based, the claim is dismissed.

IT IS SO ORDERED.

DATED: February 15, 1990.

/s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge

[Illegible]

KENNETH CURNOW)
) CASE NO.
vs) CV-F-86-602-REC
RIDGECREST POLICE)
)

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California. That on 2/15/90 I served a copy of the attached

ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

by placing said copy in a postage-paid envelope addressed to the persons hereinafter listed, by depositing said envelop in the United States Mail at Fresno, California, or by placing said copy into an inter-office delivery receptacle located in the Clerk's Office.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH CHRISTOPHER CURNOW, a minor, by and through his guardian ad litem, SANDRA CURNOW; KEN CURNOW; SHEILA EFFLANDT; SANDRA CURNOW, as administrix of the estate of STEVEN MURRAY CURNOW, deceased; CRIS CURNOW; and SANDRA CURNOW as an individual,	No. 90-15314
Plaintiffs-Appellees,	D.C. No. CV-F-86-602-REC
v.	
THE RIDGECREST POLICE, a municipal law enforcement agency; THE CITY OF RIDGECREST, a municipal corporation; THE STATE OF CALIFORNIA, a sovereign state; THE COUNTY OF KERN, a municipal corporation; EDWARD JOHN LUARCA aka E.J. LUARCA; STEPHEN COMPTON; RANDY GENE BIAS; JEFFREY KRUGER; KURT FOWLER; JERRY LINKENKOGEL GARRY DAVIS; CHRIS DAVIS; BOB PRATT and EDWARD R. JAGELS,	ORDER
Defendants-Appellants.	(Filed Apr. 2, 1992)

Before: ALARCON and RYMER, Circuit Judges; and MCDONALD, District Court Judge*

Appelants' [sic] petition for rehearing filed January 9, 1992 is DENIED.

No. 92-137

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In The

Supreme Court of the United States

October Term, 1992

THE RIDGECREST POLICE, a Municipal Law Enforcement Agency; THE CITY OF RIDGECREST, a Municipal Corporation; EDWARD JOHN LUARCA aka E.J. LUARCA; STEPHEN COMPTON; RANDY GENE BIAS; JEFFREY KRUGER,

Petitioners,

vs.

KENNETH CHRISTOPHER CURNOW, a minor, by and through his Guardian ad Litem, SANDRA CURNOW; KEN CURNOW; SHEILA EFFLANDT; SANDRA CURNOW as Administratrix of the Estate of STEVEN MURRAY CURNOW, Deceased; CHRIS CURNOW and SANDRA CURNOW, as an individual,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Attorneys for Respondents

ELLIOTT L. AHERONI
16311 Ventura Blvd.
Suite 1050
Encino, CA 91436-2183
(818) 501-2901

LAW OFFICES OF CARL OSBORNE
1157 South Beverly Drive
Los Angeles, CA 90035
(310) 278-2345

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly consider the statement of Mercedes Taylor in determining the Motion for Summary Judgment?

2. Did the Court of Appeals err in denying Petitioners Motion for Summary Judgment?

3. Did the District Court err in denying Petitioners Compton, Kruger and Bias' claim of qualified immunity?

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II

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

This action stems from the shooting death of Steven Curnow, a resident of Ridgecrest, California. Plaintiffs allege that decedent's death constituted a violation of their civil rights under 42 U.S.C. §§ 1981, 1983 and 1985 by defendants.

On October 7, 1988 plaintiffs filed the Third Amended Complaint. [App. C00198]

On December 19, 1988 hearing was held on defendants' Motion to Dismiss pursuant to Rule 12(b)(6), Motion to Strike pursuant to Rule 12(f) and Sanctions pursuant to Rule 11. On March 3, 1989 the Court issued it's ruling on the motion. [App. C00187]

On January 10, 1990 Petitioners filed their motion for Summary Judgment. [App. C00127-00160]

On February 12, 1990 in the United States District Court for the Eastern District of California, hearing was held on Petitioners motion for Summary Judgment on the grounds of Qualified Immunity.

On February 15, 1990 the Court issued its findings and Order denying defendant's motion for Summary Judgment, from which the defendants appealed to the United States Court of Appeals for the Ninth Circuit. [App. C00101]

On December 26, 1991 the Court of Appeals issued and filed its opinion, affirming the ruling of the District Court in denying the motion for Summary Judgment.

[App. C00004] From that opinion the Petitioners have filed this Petition for Writ of Certiorari.

B. STATEMENT OF FACTS

On April 5, 1986, while investigating a shooting report at the residence of decedent, police allegedly went to the wrong house, ordered those residents out of the house and, after discovering their mistake, went to the decedent's residence. Defendant Bias, a police officer, spoke with Mercedes Taylor and decedent, who allegedly showed his rifle to Bias who told decedent that it was legal to have. The police concluded that matter was a vandalism incident.

Respondents allege that the police were informed that Taylor had been threatened by her ex-husband, that she believed him responsible for the incident and could return at any time, and that this was the reason for the rifle.

On April 6, 1986 the police returned to decedent's residence. Decedent and Taylor had gone to a bar earlier that evening, Taylor was allegedly intoxicated. Decedent took Taylor to his residence and placed her on his living room floor. While police were re-interviewing decedent's neighbors they walked across a common driveway and looked through decedent's window where they saw decedent bent over Taylor.

The police allege that decedent was slapping Taylor in the face and saying "Wake up!", that he was gesturing into the kitchen as if another person were present, and that Taylor appeared to be unconscious. The police then

called for back-up. After back-up officers arrived, the police again peered into the house and saw a weapon lying on the floor. They concluded that Taylor was the victim of a homicide.

The police devised a plan of entry to break down the door. It is at this point that the crucial facts are disputed. As the police entered, they contend decedent grabbed for the weapon. They contend they then shot him in the arm and back. Plaintiffs, however, contend that defendants simply broke the door down and began shooting. Plaintiffs argue that as decedent turned to flee, the police shot him again.

Plaintiffs claim that Curnow's death constituted a violation of plaintiffs' civil rights under 42 U.S.C. §§ 1983 & 1985.

III

ARGUMENT

A. Mercedes Taylor's Statement Was Correctly Considered

Mercedes Taylor's statement was properly considered by the district court in denying summary judgment. The District Court's order [App. C00102-C00104] found that Mercedes Taylor's statement was admissible. The district court's order at page 2, line 24 - page 3, line 11 [App. C000102] refers to and quotes the court reporter who signed a statement under penalty of perjury stating:

> "I, KRISTIN COIL, shorthand reporter do hereby state:

> "That prior to being examined, the witness named in the foregoing sworn statement, to wit, MERCEDES TAYLOR, was duly sworn to testify the truth, the whole truth, and nothing but the truth;
>
> "That said sworn statement was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting.
>
> "I further state that I am not interested in the event of the action." [App. C00103]

At [App. C00104] the District Court stated, "The court's conclusion that it will allow use of Taylor's statement presents the court with disputed material facts." As the Court of Appeal held in *Geear v. Boulder Community Hospital,* 844 F.2d 764 (1988) that Rule 56 requirements are satisfied by the District Court examining written briefs with supporting materials.

Petitioners' petition concedes, at page 4, the authority of a court reporter to administer oaths.

The Ninth Circuit agreed with the district court and found that, under Rule 56(c), Taylor's testimony was the substantial equivalent of a sworn affidavit. [App. C00004] Thereafter, the court held that the district court "properly considered Taylor's statement pursuant to Rule 56(c) because her answers to the questions were given under oath." The court found Taylor's statement to be "at least as reliable as an affidavit," notwithstanding the fact that the statement was unsigned.

The Ninth Circuit cited two of its previous cases, *Hoover v. Switlik Parachute Co.,* 663 F.2d 9645 (9th Cir. 1981), and *In re Sunset Bay Associates,* 944 F.2d 1503 (9th

Cir. 1991), in support of its ruling. In *Hoover*, the Ninth Circuit admitted depositions for the purpose of summary judgment that were taken with an opportunity for the opposing party to cross-examine the deponents. The *Hoover* court held that, while the documents could not be admitted as Rule 56(c) depositions, they met the requirements for Rule 56(c) affidavits since they were made on personal knowledge and set forth facts in evidence. (*Hoover, supra*, 663 F.2d at 966.)

Thereafter, the court in *In re Sunset Bay* took the logic behind *Hoover* one step further. The court concluded that a witness statement taken in question and answer form, which was not subject to cross-examination nor signed, was admissible under Rule 56(c). The court explained its decision as an application of the "pragmatic" approach to consideration of unverified materials; namely, whether the document "is at last as reliable as an admissible affidavit." (*In re Sunset Bay, supra*, 944 F.2d at 1509-1510.) The court found that the document was reliable because the deponent was *sworn*, even though the document was unsigned.

Contrary to Petitioners' arguments, the decision of the Ninth Circuit to admit the unsigned statement of a witness for purposes of summary judgment is not in conflict with the decisions of the courts in the other circuits to consider the issue. In none of those cases had the witness' statement been sworn and taken by a court reporter who also swore to the fact of the witness' sworn testimony.

Petitioners argue that Rule 56(c) mandates the entry of summary judgment due to respondents failure to

establish that a genuine issue of material fact exists. In support of their argument petitioners cite this Court's opinion in the case of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

While the rule and case are cited for the correct proposition, this case does not support Petitioner's argument against the denial of the motion for summary judgment. In *Celotex, supra,* this court, in a 5-4 ruling, overturned the reversal of a grant of summary judgment. In citing its previous holding in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), this court affirmed that:

> " . . . the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact."

The court overturned because the district court made an express finding of no material fact. Here, on the contrary, the district court found that the evidence submitted did not preclude a finding of respondents' presenting a genuine material fact.

B. The Court of Appeals Was Correct in Affirming the District Court's Denial of the Motion for Summary Judgment

This case has clearly disputed facts, supported by opposing declarations and evidence submitted by the parties. The scope of inquiry in such appeals is extremely narrow, although these appeals appear to be a fairly routine part of § 1983 cases which survive motions for summary judgment.

As Circuit Judge Schroeder stated in *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1210 (9th Cir. 1988),

> " . . . defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decision."

The Court held in *Geear v. Boulder Community Hospital*, 844 F.2d 764 (1988) that Rule 56 requirements are satisfied by the District Court examining written briefs with supporting materials. Inferences to be drawn from underlying facts contained in evidential sources submitted to the court must be viewed in the light most favorable to the party opposing the motion. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (1987).

This is a case involving the denial of the motion for summary judgment because the District Court did not believe the defendants were entitled to qualified immunity. It is a case, and resulting order and affirming decision, dealing with disputed facts. The district court order spelled out the different facts stated by the affidavits and declarations.

The solitary basis for petitioners' position is the statement of Mercedes Taylor was not admissible. The court's order stated at page 4 "The court's conclusion that it will allow use of Taylor's statement presents the court with disputed material facts." The trial court relied on *White by White v. Pierce County*, 797 F.2d 812, 815-816 (9th Cir. 1986), in which the Ninth Circuit held:

> "Probable cause is ordinarily a question for the jury, and denial of summary judgment is appropriate only if no reasonable jury could find that

> the officers had probable cause. *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984). We have applied this rule when determining whether officers engaging in a search had qualified immunity . . . If the question of probable cause is allowed to go to the jury where qualified immunity is at issue, this defense will be effectively lost . . . Here, the existence of probable cause was to be effectively lost . . . Here, the existence of probable cause was to be determined by the trial court, . . . "
>
> *White by White, supra,* on Excessive Force:
>
> "The question of the reasonableness of the force used in an arrest is usually for the jury. See, e.g., *Robins*, 773 F.2d at 1010 [*Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985)]; McKenzie, 738 F.2d at 1011. However, as with probable cause, the trial court, and this court on appeal, must decide this issue on summary judgment where qualified immunity is at issue."

Where the underlying material facts are disputed, the district court decides the issue of whether plaintiff's clearly established constitutional rights were violated by assuming that plaintiff's version of the facts is correct. The Court of Appeals has repeatedly held that defendants have the burden of proof, *Benigni v. City of Hemet*, 853 F.2d 1519, 1525 (9th Cir. 1988), and the standards governing motions for summary judgment.

Benigni involved a discussion of the proper jury instructions on the issue of qualified immunity, another indication that there will be circumstances where qualified immunity cannot be resolved pretrial.

Di Martini v. Ferrin, 889 F.2d 922 (9th Cir. 1989); *Scott v. Henrich*, 700 F.Supp. 498 (D.C. Mont. 1988); *Wood v. Ostrander*, 879 F.2d 583, 591, 596 (9th Cir. 1989); *Manhattan Beach Police Officers v. Manhattan Beach*, 881 F.2d 816, 819 (9th Cir. 1989) are all Ninth Circuit cases consistent with the findings of *Benigni*.

In another § 1983 case the Court of Appeal ruled in *Goka v. Bobbitt*, 862 F.2d 646 (1988) that the moving party may not identify only those portions of the record which support their position on the theory that the burden of producing contrary was on the party opposing summary judgment.

C. The Court Correctly Denied Qualified Immunity To Petitioners Compton, Kruger and Bias

Petitioners fail to grasp the district court's findings regarding two shootings of the decedent. The first shooting, subsequent to the entry into the house, has been found by this court to be reasonable. As the court stated at page 6, line 22 through page 7, line 11, [App. C00106] the second shooting, as decedent fled is indeed in question.

> "However the second event involved, the actual shooting of decedent, is more troublesome. Here, the facts necessary for a proper determination of this issue are in dispute. If decedent did in fact reach for the weapon upon the police's entry into the house, their subsequent shooting would be justified.
>
> " . . . In addition, the propriety of defendants' shooting decedent as he fled, if true, is also questionable. Such actions would violate clearly

> established law and, hence, qualified immunity would no longer be available."

(at page 7, lines 5-8) [App. C00107]

The Court of Appeals' opinion, however, went further and found, at page 17128 that the defendants-appellants were not entitled to qualified immunity due to the conflicting evidence presented to the district court:

> "Thus, viewing the evidence in the light most favorable to the nonmoving party, the defendants-appellants are not entitled to qualified immunity." [A-11]

The more recent cases of *Garmon v. Lumpkin County*, 878 F.2d 1406 (1989) and *Melear v. Spears*, 862 F.2d 1177 (1989) both held that qualified immunity is not a defense to an action against someone in an official capacity where the actions of the defendant were not reasonable.

1. Qualified Immunity

Excessive Force

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) is the benchmark case, holding that a law enforcement officer in a § 1983 action is entitled to qualified immunity from liability for damages if his conduct does not violate clearly established constitutional rights, of which a reasonable law enforcement officer would have known. The Supreme Court explained, in *Anderson v. Creighton*, 483 U.S. 635 (1987), the question of clearly established constitutional rights must be decided in the particular rather than the general sense and that the inquiry is totally objective, although the inquiry is fact specific.

In a similar case summary judgment was denied to an officer who shot a store owner under the mistaken belief that there was a hostage situation. The court held that the complex factual situation created genuine issues requiring jury determination. *Thompson v. Spikes*, 663 F.Supp. 627 (SD GA 1987).

The district court cited *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) in its order of March 3 [Page 4, E.R. 83] and clearly concluded that qualified immunity was not available to petitioners. " . . . If the officials knew, should have known, or intended that their actions would violate plaintiff's rights, the immunity will not be available. Qualified immunity is a "good faith" defense. Therefore, subjective aspects involved in this defense such as the officers' experiences, values and emotions must be considered."

In accord are *White By White v. Pierce County*, 797 F.2d 812 (9th Cir 1986); *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

The district court also considered various cases dealing with police shootings and applied them to the instant case. The court, at page 7, line 17 of the order denying summary judgment [App. C00107]:

> "Taking these facts into consideration with the sworn statement of Mercedes Taylor compels denial of this motion. Her statement, if eventually found to be true by a jury, that the decedent was not hitting her, that the police did not identify themselves before firing the first shot, that decedent was shot in the back by the first shot and inferentially did not reach for the weapon prior to the first shot, that the decedent's gun

with a clip that extrudes 5 inches was unloaded, and that the decedent grabbed the gun by the muzzle as he attempted to flee the residence persuaded the court that the deadly force used under these circumstances was constitutionally unreasonable."

IV

CONCLUSION

This case, unlike those cited by petitioners in their petition, is not without serious disagreement as to the basic facts. The other cases dealt with differing arguments over basic facts which were not disputed, only the *import* of the facts. The instant case is a Court of Appeals Opinion upholding an **interlocutory order based on a factual finding not on a dispute over the law** as interpreted by the court.

The Court of Appeals made its ruling based on **conflicting facts** and stated that because of a factual conflict it could not find that the Defendants/Appellants (Petitioners herein) were entitled to qualified immunity for purposes of the motion for summary judgment.

Based on all the foregoing, Respondents urge this court to uphold the Court Of Appeal's Ruling affirming the denial of Summary Judgment and deny the Petition for Writ of Certiorari.

Dated: October 16, 1992

Respectfully submitted,

ELLIOTT L. AHERONI
Attorney for Respondents

Supreme Court, U.S.
FILED
NOV 2 1992
OFFICE OF THE CLERK

(3)

No. 92-137

In The

Supreme Court of the United States

October Term, 1992

THE RIDGRECREST POLICE, a Municipal Law Enforcement Agency; THE CITY OF RIDGECREST, a Municipal Corporation; EDWARD JOHN LUARCA aka E.J. LUARCA; STEPHEN COMPTON; RANDY GENE BIAS; JEFFREY KRUGER,

Petitioners,

vs.

KENNETH CHRISTOPHER CURNOW, a minor, by and through his Guardian ad litem, SANDRA CURNOW; KEN CURNOW; SHEILA EFFLANDT; SANDRA CURNOW, as Administratrix of the Estate of STEVEN MURRAY CURNOW, Deceased; CHRIS CURNOW; and SANDRA CURNOW, as an individual,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

Attorney for Petitioners

WAYNE LEMIEUX (CA Bar No. 043501)
Law Offices of Wayne Lemieux
200 N. Westlake Boulevard, Ste. 102
Westlake Village, California 91362
(805) 495-4470

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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I.

REPLY TO BRIEF IN OPPOSITION

Although the reasons which warrant the grant of a writ are adequately stated in the Petition, a brief reply is warranted to correct several assertions contained in the Brief in Opposition filed by respondents.

A. Taylor's Unsigned Statement.

1. The Brief in Opposition states at page four: "Petitioners' petition concedes, at page four, the authority of a court reporter to administer oaths." (Res.Br., 4.)

This assertion is contrary to petitioners' argument and the clear language of California Code of Civil Procedure section 2093, cited in its entirety at page four of the Petition. Respondents' statement ignores a key issue of the Petition, i.e., whether the court of appeals erroneously considered the unsigned statement of Taylor for purposes of summary judgment in the absence of evidence that Coil was authorized to administer an oath or that she accurately transcribed Taylor's statements. (Pet., 17-18.)

California Code of Civil Procedure section 2093(b), states that: "Every shorthand reporter, *certified pursuant to . . . the Business and Professions Code,* has the power to administer oaths or affirmations . . . " (Pet., 4.) Contrary to respondents' characterization, Coil is not a certified court reporter; rather, Coil's statement indicates that she is a shorthand reporter. (Pet.App., C-2, C-3; Res.Br. 3-4.) Coil's statement does not indicate that Coil is a *certified*

shorthand reporter having legal authority to administer oaths and affirmations.

Petitioners argue that the decision of the Ninth Circuit to admit Taylor's unsigned statement for purposes of summary judgment is in conflict with the decisions of most, if not all, the other circuits to consider the issue. (Pet. 13-15.) Respondents claim that none of the cases cited by petitioners involve sworn witness statements. (Res.Br., 5.) Respondents' argument misses the mark because it fails to address the question of whether Taylor's statement was, in fact, "sworn" for purposes of qualifying as a Rule 56(c) affidavit. (Pet., 17-18.) More importantly, respondents fail to address whether the Ninth Circuit's holding in *In re Sunset Bay Assoc.*, 944 F.2d 1503 (9th Cir. 1991) is a valid construction of Rule 56(c).

2. The Brief in Opposition states at pages 5-6 that: "Petitioners argue that Rule 56(c) mandates the entry of summary judgment due to respondents' failure to establish that a genuine issue of material fact exists. In support of their argument, petitioners cite this Court's opinion in the case of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)." (Res.Br., 5-6.)

Petitioners discuss the *Celotex* case not in the manner urged by respondents, but to point out the Ninth Circuit's misuse of the *Celotex* decision to support its ruling in *Sunset Bay* and in this case. (Pet., 15-17.) The Ninth Circuit extracted dicta from the *Celotex* decision, that a non-moving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment, to support its ruling in *Sunset Bay* and in this case that a document is reliable where a deponent is

sworn, even though the document is unsigned. (Pet.App., A-8, A-9; *In re Sunset Bay, supra,* 944 F.2d at 1509-1510.) By misusing dicta in the *Celotex* decision, the Ninth Circuit gave an unduly broad reading to Rule 56(c) and admitted a "statement" taken in question and answer format that did not qualify as a deposition, was not signed or verified by the deponent, and was not administered by a person authorized to perform the oath ceremony. Intervention by this Court is therefore warranted to resolve the conflict between the Ninth Circuit and other courts.

B. Qualified Immunity of Officers Compton, Kruger and Bias.

1. The Brief in Opposition states at page 7 that: "The solitary basis for petitioners' position is the statement of Mercedes Taylor was not admissible." (Res.Br., 7.)

The Petition presents another question for review, i.e., whether the court of appeals erred in not granting summary judgment to three of the four named police officers involved in the case. (Pet., 19-21.) This question is presented independent of this Court's decision as to whether or not Taylor's statement was correctly admitted as a Rule 56(c) affidavit for purposes of denying petitioners' motion for summary judgment.

2. The Brief in Opposition states at page 9 that: "Petitioners fail to grasp the District Court's findings regarding two shootings of the decedent. The first shooting, subsequent to the entry to the house, has been found by this [sic] court to be reasonable." (Res.Br., 9; compare Res.Br. 11-12.)

Petitioners accept respondents' construction of the district court's ruling as an admission.[1] (*Brown v. Aguilar*, 202 Cal. 143, 194 (1927).) Accordingly, the only event that remains subject to a section 1983 challenge is the *second* shooting of the decedent as he exited the house.

The Ninth Circuit found that Officer Luarca fired both of the shots that led to the death of the decedent. (Pet.App., A-6.) As is evident from the court's statement of facts, Officers Compton and Kruger were involved only in the entry into the decedent's home. Officer Bias never entered the decedent's home nor fired any shots. (*Id.*, A-5, A-6.) Despite its acknowledgement of these facts, the Ninth Circuit neglected to consider petitioners' argument that, because Officers Compton, Bias and Kruger participated only in the initial planning and/or entry into the decedent's home and because they did not fire the shot that caused the death of the decedent, the officers are entitled to summary judgment on the basis of qualified immunity.[2]

The lack of attention to this argument by the Ninth Circuit is curious, not only because it conflicts with the decisions of courts in other districts and circuits (Pet.,

---

[1] In fact, the district court analyzed two events in this case: (1) the entry into the decedent's home; and (2) the actual shooting of the decedent. (Pet.App., B-6.) The first event, the entering of the residence, was expressly found by the district court to be reasonable. (*Id.*, B-6, B-8.) As to the actual shooting of the decedent, the court held that the facts necessary for a proper determination of the issue are in dispute. (*Id.*, B-6.)

[2] Petitioners raised this issue in a Motion for Reconsideration, which was denied.

19-20), but because it fails to follow its own holding in the case of *Ting v. United States*, 927 F.2d 1504 (1991). In *Ting*, an arrestee was shot and physically injured by a federal agent standing a few feet away from the suspect, in the suspect's bedroom, immediately after an arrest. Four other officers were present in the bedroom at the time of the shooting. Plaintiff alleged that the nonshooting officers violated his constitutional rights because they did not intervene to prevent his injuries. (*Ting, supra*, 927 F.2d at 1511.)

The Ninth Circuit held that the nonshooting agents may be held liable only if they personally deprived the plaintiff of a constitutional right by failing to perform an act which they were legally required to do, which was the cause in fact of plaintiff's injuries. (*Id.*) After analyzing the evidence, the court affirmed the grant of summary judgment in favor of the nonshooting officers because: (1) there was no evidence that the four nonshooting agents knew that the shooting agent would hurt or shoot the plaintiff; (2) plaintiff failed to allege that the shooting officer had a history of using abusive force; and (3) most importantly, "the agents were positioned around the room away from [the shooting officer] and [plaintiff] and were thus physically incapable of preventing the incident surrounding the shooting, all of which transpired in a matter of seconds." The court thus determined that the agents' failure to intervene was not the "cause in fact" of plaintiff's injuries. (*Id.*)

Even if this Court concludes that Taylor's statement was properly considered by the Ninth Circuit, her statement does not present any evidence that Officers Compton, Bias, and Kruger culpably participated in the acts

that caused the decedent's death. (Pet.App., A-6, C-8; Res.Br., 11-12.) There is no evidence that Officers Bias, Kruger or Compton knew that Officer Luarca would fire his weapon other than in compliance with Compton's plan, which plan has already been held to be constitutional and proper by the district court. (Pet.App., B-6.) Moreover, respondents do not allege, nor have they presented any evidence, that Luarca had a history of using abusive force or that the nonshooting officers were aware of any such tendency. Finally, respondents do not allege, nor have they presented any evidence that the nonshooting officers could have physically prevented Officer Luarca from shooting Curnow.

The Brief in Opposition does not distinguish the cases cited in the Petition or explain how Taylor's statement creates disputed material facts regarding the use of excessive force by Officers Compton, Kruger, and Bias. (Res.Br., 10-12.) Accordingly, this court should intervene to reverse the ruling of the Ninth Circuit and the district court denying summary judgment on the basis of the qualified immunity of Officers Compton, Bias and Kruger. As stated by this Court in *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), qualified immunity "is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."

II.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

DATED: November 2, 1992

Respectfully submitted,

WAYNE LEMIEUX
Attorney for Petitioners